Supreme Court, U.S.
FILED
NOV 10 2008
OFFICE OF THE CLERK

No. 08-210

IN THE
Supreme Court of the United States

E.I. DUPONT DE NEMOURS & CO., GENERAL ELECTRIC CO., AND UNC NUCLEAR INDUSTRIES, INC.,
Petitioners,

v.

STEVEN STANTON, GLORIA WISE, WANDA BUCKNER, SHIRLEY CARLISLE, AND KATHRYN JANELLE GOLDBLOOM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Price-Anderson Act, a 50-year-old federal statute establishing a comprehensive scheme for compensating the public and indemnifying nuclear operators in the event of injury from a nuclear incident, should be interpreted to incorporate a government-contractor defense.

2. Whether state law imposing a strict-liability standard on government contractors in connection with their emissions of radioactive iodine is preempted by guidelines, goals, and recommendations regarding dose tolerance limits, lacking the force of law, that were made by personnel of the contracting federal agency or another government contractor.

3. Whether the tolling afforded by *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), which held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class," may be denied to a putative class member who, for the purpose of litigating her individual claims, joins a consolidated Price-Anderson Act nuclear incident case while a motion for class certification is pending.

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RESPONDENTS' BRIEF IN OPPOSITION

This litigation involves approximately 2,000 plaintiffs who allege that their thyroid cancers or other diseases were caused by exposure to radioactive iodine ("I-131") and other hazardous substances emitted by the Hanford Nuclear Reservation ("Hanford") beginning in the 1940s, when the facility began producing plutonium for the atomic bomb. Petitioners operated Hanford under contracts with the United States. Those contracts, by their terms and under the subsequently enacted Price-Anderson Act ("PAA"), guaranteed that the United States would fully indemnify petitioners for any liability arising from a nuclear accident.

In 1957, Congress enacted the PAA for the dual purposes of encouraging the private sector to help develop nuclear energy and ensuring public compensation in the event of a nuclear accident. The Act protected contractors of the former Atomic Energy Commission ("AEC"), the AEC's licensees (who constructed, owned, and operated commercial nuclear-power reactors), and the public from the consequences of a nuclear accident. It established an aggregate liability limit, required that licensees obtain private insurance, and provided for government indemnification, up to the liability limit, in the event government contractors or licensees were found liable. Hence, the statute allayed contractor and licensee fears of catastrophic liability while assuring that the public would be compensated. Over the ensuing years, Congress made the PAA more comprehensive, with the goal of improving the compensation system.

After the court of appeals' rulings following a bellwether trial involving six plaintiffs, petitioners seek review of three questions. First, the court of appeals held that the PAA does not incorporate the government-

contractor defense announced by this Court in *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988). Second, the court ruled that because federal guidelines or recommendations governing Hanford emissions of I-131 during the relevant period did not have the force of law, they could not preempt state law imposing a strict-liability standard.

Petitioners do not even attempt to argue that the court of appeals' rulings on these matters of first impression conflict with any other federal appellate decision. Nor are the questions of such national importance as would warrant this Court reviewing them in their first-ever appearance.

Regarding the third question presented, petitioners argue that the tolling afforded by *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), which held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class," was "forfeited" by respondent Wise because she joined the consolidated PAA action to assert her individual claims while a motion for class certification was pending, rather than waiting until the motion was resolved. As shown below, petitioners' claim of a circuit split is incorrect. This case is a poor vehicle for addressing the question in any event, and the court of appeals properly refused to circumscribe *American Pipe*.

STATEMENT OF THE CASE

The petition's rationale for review of the first two questions presented is that the court of appeals answered them incorrectly. Therefore, we must first describe the PAA compensation scheme, of which petitioners make only passing mention.

A. The PAA

1. **1957 Act.** By 1954, Congress had concluded that it would be in the national interest for the government to encourage the private sector to develop atomic energy, subject to federal regulation and licensing. The Atomic Energy Act of 1954 accordingly provided for the licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under the AEC's supervision. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 63 (1978). The possibility of monumental liability from a nuclear accident, however, remained a major deterrent to industry participation. S. Rep. No. 85-296 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1803, 1803. In response, Congress enacted the PAA, Pub. L. No. 85-256, 71 Stat. 576 (1957). The Act's purposes were two-fold: "to protect the public and to encourage the development of the atomic energy industry." *Id.* § 1 (codified at 42 U.S.C. § 2012(i)). Accordingly, Congress instituted a comprehensive regime of liability insurance and government indemnification for nuclear contractors and licensees that limited the potential aggregate "public liability" in the event of a "nuclear incident" and created a governmental source of funds to pay claims. *Id.* § 4 (codified at 42 U.S.C. § 2210); *see Duke Power*, 438 U.S. at 64-65.[1]

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[1] A "nuclear incident" includes any occurrence within the United States causing "bodily injury, sickness, disease, or death, or loss of or damage to property to property, or loss of use of property," arising out of "the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). "Public liability" is, in part, "any legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w).

The original PAA had three central features. First, it established an aggregate liability limit for nuclear operators under contract or license with the federal government. Second, it authorized the AEC to enter into indemnification agreements with its contractors, providing that where liability exceeded available private insurance, the government would indemnify the person(s) held liable, up to the liability limit. S. Rep. No. 100-218, at 2 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1477 (recounting history of Act); *see* Pub. L. No. 85-256, § 4 (codified at 42 U.S.C. § 2210(d) & (e)). Third, the Act "channeled" liability to the government contractor or licensee by providing that *any* person held liable for a nuclear incident, not only the contractor, licensee, or person in privity with them, would be indemnified. S. Rep. No. 100-218, at 2, 1988 U.S.C.C.A.N. 1477; S. Rep. No. 85-296, 1957 U.S.C.C.A.N. 1818; *see* Pub. L. No. 85-256, § 3 (codified at 42 U.S.C. § 2014(t)). The Act was designed "to give financial protection to innocent members of the public who might suffer in the unexpected case of a runaway reactor." 1957 U.S.C.C.A.N. 1813.

The 1957 Act adopted a policy of minimal interference with state tort law in the event of a nuclear incident. The Joint Committee on Atomic Energy explained: "Since the rights of third parties who are injured are established by State law, there is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity." *Id.* at 1810; *see also id.* at 1823 (state courts maintain right "to establish the liability of the persons involved in the normal way").

2. 1966 Amendments. Congress made several significant changes in 1966 to "protect[] the health and

safety of the public and employees from the potential hazards which accompany the beneficial applications of nuclear energy." S. Rep. No. 89-1605 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3201, 3204 (citation omitted). Congress had become concerned that some states' tort laws might not impose strict liability on defendants for nuclear incidents—contrary to Congress's original supposition. *Id.* at 3203-04, 3206-08. The absence of a uniform liability standard would be particularly problematic, the Joint Committee believed, if a serious nuclear incident occurred, potentially leading to many suits filed in different jurisdictions. *Id.* at 3204, 3208.

Instead of creating new federal tort law to establish a strict-liability standard, Congress authorized the AEC to incorporate waivers of certain defenses in its indemnity agreements with its licensees and contractors in the event of a serious nuclear incident, called an "extraordinary nuclear occurrence" ("ENO"). The AEC was expected to require licensees and contractors, in this situation, to waive any defense related to (1) the plaintiff's conduct or defendant's lack of "fault," (2) "charitable or governmental immunity," and (3) the statute of limitations, if suit were filed within three years after the plaintiff knew or should have known of his injury and the cause, but no more than ten years after the nuclear incident. Pub. L. No. 89-645, §§ 1, 3, 80 Stat. 891 (1966) (codified at 42 U.S.C. §§ 2014(j), 2210(n)(1)). Congress's purpose in enacting the waiver-of-defenses provision was to promote rapid compensation for victims of the most serious nuclear incidents by adopting a strict-liability standard and requiring the victim "to prove only that he or his property was damaged and that such damage was caused by the nuclear incident." S. Rep. No. 89-1605, 1966 U.S.C.C.A.N. 3209; *see also id.* at 3201-

02. For claims involving an ENO, the amendments created federal jurisdiction in the district in which the accident occurred and allowed defendants to remove or transfer pending actions to that district, enabling all claims arising from an ENO to be consolidated in a single federal court. Pub. L. No. 89-645, § 3 (codified at 42 U.S.C. § 2210(n)(2)).

3. 1988 Amendments. Congress enacted the 1988 Amendments with a sense of urgency. The indemnification authority of AEC's successors (the Nuclear Regulatory Commission ("NRC") and the Department of Energy ("DOE")) had expired on August 1, 1987, S. Rep. No. 100-218, at 3, 1988 U.S.C.C.A.N. 1478, "rais[ing] serious concerns about adequate compensation for victims of a nuclear accident at a DOE facility." S. Rep. No. 100-70, at 16 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1429. As with earlier amendments, the 1988 legislation's central thrust was to improve the compensation system for nuclear-incident victims. S. Rep. No. 100-218, at 4, 1988 U.S.C.C.A.N. 1479. Accordingly, Congress extended the agencies' indemnification authority for fifteen years; increased the aggregate liability limit and indemnification level; created an expedited mechanism for congressional action if additional compensation were needed; and broadened the compensation system to include nuclear waste storage, transportation, and disposal. S. Rep. No. 100-70, at 13, 1988 U.S.C.C.A.N. 1425-26; *see* Pub. L. No. 100-408, 102 Stat. 1066 (1988) (codified at 42 U.S.C. § 2210). The amendments also *required* DOE to enter into indemnification agreements with contractors whose activities involved a risk of liability for a nuclear incident—again, to "guarantee to the public that the Price-Anderson system will be available to

provide compensation in the event of a nuclear incident." S. Rep. No. 100-70, at 19, 1988 U.S.C.C.A.N. 1432; *see* Pub. L. No. 100-408, § 4 (codified at 42 U.S.C. § 2210(d)(1)).

Responding to litigation over the Three Mile Island ("TMI") accident, Congress also established an exclusive federal right of action for victims of *any* nuclear incident. After the NRC determined that the TMI accident was not an ENO, lawsuits consolidated in the Middle District of Pennsylvania were dismissed for lack of subject-matter jurisdiction. S. Rep. No. 100-218, at 13, 1988 U.S.C.C.A.N. 1488. To ensure that federal courts could (and, as a practical matter, would) hear all public-liability claims, Congress broadened the grant of federal jurisdiction to cover all nuclear incidents, not only ENOs. *Id.*; H.R. Rep. No. 100-104, pt. 1, at 18 (1987); *see* Pub. L. No. 100-408, § 11 (codified at 42 U.S.C. § 2210(n)(2)). Additionally, through its definition of "public liability action," Congress created an exclusive federal cause of action under the PAA, while specifically adopting state law for the substantive legal standards. Thus, a "public liability action," which "means any suit asserting public liability," "shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section." Pub. L. No. 100-408, § 11 (codified at 42 U.S.C. § 2014(hh)).

B. Proceedings Below

In 1990, plaintiffs filed PAA class litigation in the Eastern District of Washington, alleging that they suffered from cancer or other diseases from exposure to I-131 emissions from Hanford. *See* Pet. App. 8a-14a. The

litigation was consolidated under one master caption, and eventually approximately 2,000 plaintiffs joined the case. The parties agreed to a bellwether trial, hoping to expose the strengths and weaknesses of their cases and pave the way for settlement. *Id.* at 14a-15a. Respondents are five bellwether plaintiffs who lived downwind of Hanford during and after World War II and suffered from thyroid cancer or other thyroid diseases. *Id.* at 15a. A jury returned verdicts in favor of respondents Steven Stanton and Gloria Wise. *Id.* at 17a.[2]

In the district court, the plaintiffs moved to strike petitioners' government-contractor defense, and the district court granted the motion, holding the defense inapplicable to PAA claims. *Id.* at 68a-86a. In addition, the plaintiffs moved for partial summary judgment on the liability standard, maintaining that petitioners had engaged in an abnormally dangerous activity and accordingly should be held strictly liable under Washington law, as incorporated by the PAA. The district court agreed, rejecting petitioners' argument that purported federal standards governing Hanford's emissions preempted the state-law strict-liability standard. *Id.* at 87a-118a.

Regarding the tolling issue, applicable only to respondent Wise, the district court held that the 1990 class litigation tolled the statute of limitations for all members of the class. Excerpts of Record ("ER") (9th Cir.) 109-12. In April 1993, Wise was diagnosed with thyroid cancer that, the jury concluded, was caused by I-131 emissions

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[2] Although respondents Buckner, Carlisle, and Goldbloom did not prevail at trial, they obtained reversals below on evidentiary grounds not before this Court.

from Hanford. Pet. App. 38a. A year later, in April 1994, plaintiffs moved for class certification. *Id.* In July 1997, pursuant to a stipulation among the parties, the district court allowed Wise—already a putative class member and part of the consolidated action—to join the action to pursue her individual personal-injury claims. Record ("R.") 977. Wise did not file a separate complaint, pay a filing fee, serve process, or do anything else associated with the initiation of a civil action.

Petitioners acknowledge that if *American Pipe* applies to Wise's claims, her claims were timely. Moreover, Wise maintains that, under Washington law, her claims accrued within the applicable three-year statute of limitations and, thus, that her joinder was timely even without the benefit of tolling, *see infra* note 6, and the district court held that the accrual question, as it relates to all plaintiffs, was one for the jury. ER 94-108. But this question was never submitted to the bellwether jury because, in the district court, petitioners did not challenge *American Pipe*'s applicability as to any plaintiff, including Wise. *See* Pet. App. 37a.

The court of appeals unanimously affirmed on the two threshold issues. First, the court held that the PAA did not encompass the government-contractor defense because the statute predated clear judicial recognition of the defense and because the PAA's "comprehensive liability scheme is patently inconsistent with the defense and precludes its operation in this case." *Id.* at 21a.

Second, the court of appeals ruled that the Washington-law strict-liability standard was not preempted because "no federal standards governing emission levels existed at the time of the I-131 emissions."

Id. at 28a. The "tolerance doses" recommended and implemented by government scientists working on Hanford "did not carry the force of law" but were "internal guidelines" lacking any preemptive force. *Id.* at 28a-29a.

Finally, although acknowledging that the *American Pipe* issue was raised "for the first time on appeal," *id.* at 37a, the court of appeals reached it and rejected petitioners' argument that tolling is "forfeited" by class members who file suit while a class certification motion is pending. The court explained that its ruling dovetailed with the purpose of statutes of limitations: providing notice to defendants of the scope of the claim. *Id.* at 41a-42a. The court did not mention that petitioners' failure to raise the issue below had effectively precluded Wise from arguing to the jury that her claims were timely even absent tolling.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Regarding Whether the PAA Incorporates the Government-Contractor Defense, and the Court of Appeals' Decision Was Correct.

No conflicting case law exists regarding whether the PAA incorporates the government-contractor defense. Moreover, the court of appeals' ruling that the PAA does not encompass the defense has no implications for state tort-law claims and no application to federal law beyond the PAA.

As to the PAA, the court of appeals' holding will not affect the willingness of contractors to work with the United States on nuclear-power projects because the statute indemnifies contractors in full if they are found liable for a nuclear incident. Given the bellwether trial

outcome and the guarantee of full indemnification, petitioners face no prospect of any, let alone ruinous, liability. And if Congress believes that the court of appeals' decision regarding the government-contractor defense is problematic, it may adjust the PAA scheme, as it has frequently done. Indeed, Congress's practice of continually reauthorizing DOE's and NRC's indemnification authority (most recently in 2005) reflects ongoing congressional monitoring of the PAA system and a willingness to modify it as necessary.

Lacking conflicting decisions or an issue of national importance, petitioners are left to attack the court of appeals' decision on the merits, distort statements in the court's opinion, and exaggerate the ruling's ramifications.

A. The petition spends several pages touting the government-contractor defense, Pet. 16-19, but whether the defense serves important federal policy interests that, when *Boyle*'s conditions are met, justify preemption of state tort law is beside the point. In the 1988 PAA amendments, Congress enacted a federal right of action for nuclear-incident victims, albeit one governed by state-law substantive standards. 42 U.S.C. § 2014(hh); *see El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484 & n.6 (1999); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991). The Hanford cases were brought pursuant to that federal right of action. The question, then, is whether the PAA cause of action should be interpreted to incorporate a government-contractor defense. The court of appeals ruled correctly that it should not.

As an initial matter, the assumption that the government-contractor defense necessarily applies to a

federal cause of action is wrong and misunderstands the defense recognized in *Boyle*. That defense rested on principles of federal preemption of state law in light of the "significant conflict" that may arise between federal interests and state law in the government procurement context. 487 U.S. at 504-13. *Boyle* accordingly discussed the conditions in which "displacement of state law" would be appropriate. *Id.* at 507-08, 512-13. The Court did not recognize a free-floating government-contractor defense that would displace *federal* statutory rights as well. Thus, because respondents' claims are brought pursuant to a *federal* statute, petitioners have no legal basis to assert that the government-contractor defense is available to them under the PAA, which specifies no such defense.

B. Even if *Boyle*'s government-contractor defense could be incorporated into federal statutes, the court of appeals rightly ruled that the defense does not apply to PAA actions. "[F]ederal common law is 'subject to the paramount authority of Congress.' It is resorted to '[i]n the absence of an applicable Act of Congress.'" *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981) (citations omitted). "Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, *except when a statutory purpose to the contrary is evident.*" *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (emphasis added); *see* Pet. App. 20a-21a.

Petitioners make much of the court of appeals' conclusion that the government-contractor defense "was first recognized by the Supreme Court less than twenty years ago in *Boyle*," less than two months before enactment of the 1988 PAA amendments, and that "the statute predates clear judicial recognition of any such

defense." Pet. 19 (emphasis omitted) (quoting Pet. App. 19a, 21a). The significance of this preliminary issue—whether the presumption favoring incorporation of a common-law doctrine applies because the government-contractor defense purportedly was "long-established and familiar" when Congress acted—is overwhelmed by the fact that the PAA "speak[s] directly," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), to the problem of government-contractor liability arising out of nuclear incidents. As the court of appeals recognized, the PAA's "comprehensive liability scheme is patently inconsistent with the defense and precludes its operation in this case." Pet. App. 21a. Because the incompatibility of the PAA and the government-contractor defense is so evident, respondents will address this paramount point first and then briefly discuss why the court was correct that the defense does not even presumptively apply.

Petitioners proclaim that "like[] it or not, the government-contractor defense is the law of the land," Pet. 25, but insofar as federal causes of action are concerned, that is true only so far as Congress intends it to be. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991) (presumption favoring common-law principles "properly accorded sway only upon legislative default, applying where Congress has failed expressly or impliedly to evince any intention on the issue"). The PAA and the government-contractor defense occupy the same ground and cannot be reconciled. Both seek to relieve government contractors of financial responsibility for activities they perform for the federal government. Not only does the PAA "speak directly" to the problem of government-contractor liability resulting from nuclear incidents, but it approaches the problem quite differently from the defense

announced in *Boyle*. Rather than absolve government contractors of *liability* for harm from a nuclear incident where the government has exercised a discretionary function and is immune under the Federal Tort Claims Act ("FTCA"), Congress chose to free contractors and other actors of any *financial responsibility* for that liability by requiring the United States to indemnify the contractor, up to the liability limit, thereby assuring "a ready source of funds available to compensate the public after an accident." S. Rep. No. 100-70, at 14, 1988 U.S.C.C.A.N. 1426.

For this reason, the petition's quotation of the policy rationale for the government-contractor defense—that it "makes little sense to insulate the Government against financial liability" for its judgment that a particular feature of military equipment is necessary "when the Government produces the equipment itself, but not when it contracts for the production," Pet. 17 (quoting *Boyle*, 487 U.S. at 512)—is inapt. Under the PAA, the government is *supposed* to pay. Congress structured the PAA precisely so that DOE contractors would be liable for injuries arising from a nuclear incident, as provided under state-law standards, 42 U.S.C. § 2014(hh), but relieved of the financial consequences of that liability through mandatory indemnification agreements. *Id.* § 2210(d). Thus, no reason exists to read a defense into the Act to absolve contractors of liability when Congress intended that they be held liable, but then indemnified by the United States.

To construe the PAA to incorporate the government-contractor defense, releasing the contractor from liability, would gut the Act, deny the public compensation when a government contractor is involved, and render pointless the Act's complex indemnification-aggregate-liability-limit

system that is specifically directed at *both* government contractors and licensees. Petitioners deny that reading a government-contractor defense into the Act would undermine its compensatory purposes, commenting that "the vast majority of nuclear facilities in this country are operated not by government contractors, but by private utilities." Pet. 24. Whether or not true, the point is irrelevant. Operators of nuclear reactors, who are licensed by the NRC, are governed by their own separate indemnification provision and financial protection requirements. 42 U.S.C. § 2210(a)-(c). The PAA devotes a detailed section specifically to DOE contractors whose activities "involve the risk of public liability." *Id.* § 2210(d). The contractor half of the Act would be largely useless if the statute were construed to incorporate a government-contractor defense denying compensation to victims, when *affording* compensation was one of the two principal purposes of the statute.

Furthermore, petitioners offer no reason to read the Act to contemplate compensation for the public when the activities of government licensees, but not contractors, give rise to public liability. Congress could not rationally have desired similarly-situated victims to be made whole in the former situation but be left remediless in the latter. Petitioners weakly assert that the government-contractor defense would apply "only under limited circumstances where the contractor is implementing the Government's discretionary decisions," Pet. 24, but the Act applies to contractors operating facilities or working on nuclear weapons or on research and development programs—who inevitably will be implementing the government's discretionary judgments. Indeed, the 1987 congressional committee reports expressed concern about the expiration

of DOE indemnification authority under the PAA specifically with respect to contracts with four major facilities, including Hanford. *See* H.R. Rep. No. 100-104, pt. 1, at 6; S. Rep. No. 100-70, at 16-17, 1988 U.S.C.C.A.N. 1429. As one report said: "Failure to extend the Price-Anderson system for DOE contractor activities . . . would raise serious concerns about adequate compensation for victims of a nuclear accident at a DOE facility," S. Rep. No. 100-70, at 16, 1988 U.S.C.C.A.N. 1429—a strange concern if Congress contemplated that these major contractors could assert a government-contractor defense to liability, rendering the indemnification agreements unnecessary and ineffectual.

C. Petitioners assert that Congress negated the government-contractor defense in specific provisions and thus did not intend to eliminate it elsewhere. Pet. 21-22. Only one of the three cited provisions is even arguably relevant to the defense, however, and that provision cannot sustain the weight petitioners assign to it. The Act provides that a contractor engaged in underground detonation of a nuclear device shall be deprived of any "immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract." 42 U.S.C. § 2210(d)(7). This provision was added to the PAA in 1961, Pub. L. No. 87-206, § 15, 75 Stat. 474 (1961), in response to a specific potential problem.

The AEC was planning to detonate a nuclear device underground in New Mexico. Owners of nearby mines were concerned about possible damage from the detonation and sought a PAA amendment that would make the government liable for any resulting harm. *See AEC Omnibus Bills, 1961, and Amendment to Section 170 of*

the Atomic Energy Act: Hearings Before the Subcomm. on Legis. of the Joint Comm. on Atomic Energy, 87th Cong. 85-87, 97-104 (1961) ("June 1961 Hearings"). The mines' lawyer testified that existing law was "uncertain and therefore unsatisfactory" with respect to recovery if damage occurred. *Id.* at 122. Two possible courses of action were to sue the United States under the FTCA or the University of California, the prime contractor. Suing the United States was not a viable option, *id.* at 123-24, and the ability to sue the contractor was uncertain both because it was a state university entitled to sovereign immunity, *id.* at 126-27, and because "[a]t least one court" recently had held that a contractor was not liable if it was a government agent acting within the scope of its authority. *Id.* at 125.[3] Whether a government contractor could claim such a defense under the PAA was disputed. *See Operations Under the Indemnity Provisions of the Atomic Energy Act of 1954: Hearings Before the Subcomm. on Research, Dev. & Radiation of the Joint Comm. on Atomic Energy*, 87th Cong. 67 (1961) (Letter from Liberty Mutual Insurance Co.) ("[E]ven if some questions may arise as to the liability of the United States for the Commission's activities[,] we know of no legal bar to successful suits against its contractors.").

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[3] The cited decision, *Pumphrey v. J.A. Jones Construction Co.*, 94 N.W.2d 737 (Iowa 1959), had denied relief for property damage from blasting by government contractors in connection with the building of a Mississippi River lock. A contemporaneous commentary stated that *Pumphrey* was "apparently . . . the first case" to immunize an independent contractor "who otherwise would be strictly liable." Comment, *Authorized Government Contractors Exempted from Strict Liability*, 12 Stan. L. Rev. 691, 691 (1960).

Congress eliminated this uncertainty in view of the imminent detonation, but rather than create a cause of action against the government, the 1961 amendment eliminated any possible contractor defense or immunity relating to the governmental character of its work. 42 U.S.C. § 2210(d)(7). Neither the amendment itself nor its legislative history suggests that Congress endorsed the view that government contractors should otherwise be able to assert a government-contractor defense to liability under the PAA. *See, e.g.*, June 1961 Hearings at 132 (statement of Rep. Morris, amendment sponsor) (expressing "the hope that in fact the courts would approve recovery under existing law," while asserting the need to assure citizens of their entitlement to compensation).

Petitioners' reliance (at 22) on 42 U.S.C. § 2210(n)(1), the waiver-of-defense provision adopted in 1966 that authorizes DOE or NRC to require licensees and contractors to waive "any issue or defense as to charitable or governmental immunity" for ENOs, *see supra* pp. 5-6, is even wider of the mark. *See also* 42 U.S.C. § 2210(d)(1)(B)(i)(II) (similar waiver authority). This particular waiver does not pertain to a private government-contractor defense, nor do the words "charitable or governmental immunity" connote such a defense.

Instead, the waiver of "governmental immunity" was, as the words suggest, directed at *governmental* immunity, which presented a real obstacle to recovery when the AEC's contractor or licensee was a government agency. As the Joint Committee recognized, "in the case of nuclear facilities and devices operated or used by Federal agencies, it has been observed that a victim of a nuclear

incident might be denied protection entirely because of the 'discretionary function' exception to the [FTCA]." S. Rep. No. 89-1605, 1966 U.S.C.C.A.N. 3207; *see also id.* at 3220 (bill authorized AEC to require waivers by defendants, including federal agencies). To remove that obstacle in the case of ENOs, the 1966 amendments authorized "[t]he incorporation of waivers of charitable or governmental immunity." *Id.* at 3227; *see also* S. Rep. No. 100-70, at 15, 1988 U.S.C.C.A.N. 1427 (1966 amendments provided for waiver of "the Government's claim to sovereign immunity").

D. Because PAA precludes incorporation of a government-contractor defense, the question whether the defense was well established by 1988, a point petitioners discuss at length, Pet. 19-21, is largely academic, warranting only a brief response. Petitioners accuse the court of appeals of stating that this Court "made up the government-contractor defense out of whole cloth in *Boyle*," *id.* at 2, 19, and imply that the court overlooked *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), Pet. 19, in which this Court held that an agent or officer of the government purporting to act on its behalf is not liable for executing the government's specifications. But the court of appeals acknowledged that this Court "arguably planted the seeds of the government contractor defense" in *Yearsley*. Pet. App. 22a. At the same time, the court correctly observed that the defense recognized in *Yearsley* was far narrower than that later established in *Boyle*, as *Yearsley* was limited to principal-agent relationships where the agent had no discretion in the design process and simply followed government specifications. Moreover, its applicability to military contractors exercising discretionary functions was

uncertain. *Id.* And although the petition cites several circuit cases from the 1980s applying a government-contractor defense in the procurement context, Pet. 20, these cases relied on a rationale, the *Feres/Stencel* doctrine, which this Court rejected in *Boyle*, 487 U.S. at 509-11, and gave little attention to whether and under what circumstances the defense might apply to service contracts, at issue here but not in *Boyle*. This Court likewise has acknowledged that it did not establish the government-contractor defense until *Boyle*. *See Hercules, Inc. v. United States*, 516 U.S. 417, 421-22 (1996); *id.* at 434-35 (Breyer, J., dissenting).

The petition attaches significance to the fact that the 1988 PAA amendments were enacted just after *Boyle* was decided; thus, "if Congress wanted to negate the federal common law government-contractor defense in cases under the PAA, it could and would have said so in the statute." Pet. 21. But the timing supports the *opposite* inference. The government-contractor defense recognized in *Boyle* would, if incorporated into the PAA system, eliminate the ability of nuclear-incident victims to obtain compensation in many instances in which government-contractor activities caused their injuries. Given that, one would expect that a Congress member would at least *mention Boyle* before enactment of the 1988 amendments (which were designed to *strengthen* the compensation scheme for nuclear-incident victims) if the defense were perceived as potentially at odds with the PAA. But the committee reports for the legislation were prepared before *Boyle* was decided, and a search of the Congressional Record yields no mention of *Boyle* during debates on the amendments. Thus, even as late as 1988, Congress did not

perceive the government-contractor defense as applicable to the PAA.

Finally, the petition argues that the court of appeals' reasoning "extends well beyond the PAA context" because if it is true that the defense was not well-established by the fall of 1988, "then it logically follows that the defense does not apply to *any* federal statutory cause of action enacted before the fall of 1988." Thus, petitioners contend, without identifying the federal causes of action to which they refer, the court "effectively gutted the federal common law government-contract defense, and thereby subjected the Government to potentially vast financial exposure for its discretionary decisions." Pet. 25.

This argument is rhetoric without substance. First, the court of appeals' discussion regarding the status of the government-contractor defense in 1988 when Congress acted is irrelevant to the viability of the defense in cases brought under state tort law. As to federal statutory causes of action, the government-contractor defense, as discussed above, is a preemption doctrine providing a defense against claims arising under *state tort law*, not federal statutory rights. And even if the defense could potentially apply to other pre-1988 federal statutory causes of action, the court's disposition in this case, arising under the PAA, would be of little help in interpreting the scope of some hypothetical federal right of action under some completely different federal statutory scheme.

II. There Is No Conflict Regarding Whether State Law Is Preempted by a Federally Authorized Activity in the Absence of Any Federal Law.

The petition seeks review of the court of appeals' decision that petitioners may be held strictly liable under

Washington law. Petitioners state that decisions from several other circuits have held that "the PAA does not allow the imposition of strict liability under state law (as incorporated into the PAA) for federally authorized emissions." Pet. 26. The fact is, several circuits have held or said that federal nuclear-safety *regulations* preempt the state-law standard of care under the PAA. *See, e.g., Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1307-08 (11th Cir. 1998); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1093, 1103-05 (7th Cir. 1994); *In re TMI Litig.*, 940 F.2d at 859-60. Although we believe these decisions are wrong for the reasons stated in note 4 below, the court of appeals expressly *agreed* with them. *See* Pet. App. 27a. No circuit court has held otherwise. Hence, there is no circuit split and no question presented here regarding whether a federal nuclear-safety regulation preempts application of a state-law strict-liability standard, as incorporated by the PAA.[4]

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[4] Even if petitioners had been bound by federal nuclear-safety regulations, the Washington-law strict-liability standard would still govern. The PAA's text unambiguously specifies that "the substantive rules for decision" in a "public liability action" "shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [section 2210]." 42 U.S.C. § 2014(hh). A state-law strict-liability standard is not inconsistent with any provision of § 2210, the PAA's operative section. Indeed, Congress went out of its way to ensure that state strict-liability standards would govern ENOs, and even regarding other nuclear incidents, Congress intended victims to claims the "benefit of a rule of strict liability if applicable State law so provides." S. Rep. No. 89-1605, 1966 U.S.C.C.A.N. 3212. *See In re TMI Litig.*, 940 F.2d at 870 & n.3 (Scirica, J., concurring) (finding it "doubtful that Congress intended to forbid states from imposing strict liability for non-extraordinary nuclear incidents,"

Petitioners seek to go far beyond other courts' rulings, however, in insisting that because Hanford's emissions were authorized by the federal government and because government and University of Chicago scientists recommended "tolerance doses," such guidelines or recommendations should be viewed as the equivalent of federal regulatory standards. The court of appeals rightly rejected that stretch. Pet. App. 27a-28a. Here, by petitioners' own admission, prior to 1958, "the dose limits used in connection with Hanford's operations were in the form of guidelines, goals and recommendations. They were not mandatory limits with which the contractors were bound to comply." Supplemental ER 1401, Exh. B, at 2; *see also* Pet. App. 28a (tolerance doses were "internal guidelines"); *id.* at 111a (tolerance doses were "practical guidelines[,] not legally binding federal regulations").

Even if the dose limits could be construed as binding on petitioners as a practical matter, the state liability standard still would not be preempted. As the court of appeals reasoned, these tolerance doses, "recommended and implemented by military and government scientists working on the Hanford project," did not "carry the force of law and thus cannot provide the basis for a safe harbor from liability." Pet. App. 28a. Petitioners' references in the second question presented and throughout the petition to their emissions having been "federally *authorized*," *e.g.*, Pet. i, 26, underscore that they can point to no federal *law* governing their conduct.

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regardless of compliance with federal regulations); *Cook v. Rockwell Int'l Corp.*, 273 F. Supp. 2d 1175, 1188-99 (D. Colo. 2003) (exhaustive analysis of why federal nuclear-safety regulations do not preempt state law under PAA).

No other circuit has addressed whether federal recommendations or guidelines regarding nuclear emissions, in the absence of any federal *law*, can preempt state-law standards of liability under the PAA, and there is no reason for this Court to grant review to address the question.

Petitioners' argument is flawed on the merits as well. This Court has always started with the assumption that "the historic police powers of the States" (which are implicated when a state establishes strict liability to remedy injuries from abnormally dangerous activities) are "not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985) (citation omitted). Here, however, petitioners rely on federal authorization of conduct "*in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

To be sure, federal agency action having the force of law may preempt conflicting state law, whether that action takes the form of a regulation, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), or an adjudicatory order, as in the cases cited by petitioners (at 27). *See Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Radio Station, WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). But state law is not preempted by mere "unenacted approvals, beliefs, and desires" in the absence of an actual "text," *Puerto Rico*, 485 U.S. at 501, or "'authoritative' message." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002); *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (no preemption "because there is simply no federal standard for a private

party to comply with"). Lacking case law supporting its novel preemption argument, petitioners fall back on *Yearsley* for the proposition that a government contractor cannot be held liable for executing the government's will, Pet. 27, but that point is simply a rehash of their government-contractor argument.

Petitioners mock the court of appeals' opinion as stating that only federal standards "duly promulgated under the Administrative Procedure Act," which was not enacted when the emissions at issue began, Pet. 2-3, 15, 27, could preempt state law, but that is not what the court said. The court simply recognized that because both the Atomic Energy Act and the Administrative Procedure Act were enacted after emissions began, there was an absence of "federal machinery" that might have produced federal legal standards having the force of law. Pet. App. 28a-29a. Of course, just as "[f]ederal preemption did not spring into life upon the enactment of the APA in 1946," Pet. 27, neither did federal regulation. *See, e.g.*, The Federal Register Act, Pub. L. No. 74-220, 49 Stat. 500 (1935) (providing for publication of federal regulations, orders, and other official documents). Even more to the point: because nuclear safety is now pervasively regulated under federal law, the specific question presented here, where such regulation is absent, is unlikely to recur.

Finally, in a last-ditch effort to win a remand, petitioners argue that summary judgment should not have been granted against them because the parties "dispute the nature and scope of the Army's safety standards at Hanford." Pet. 28. The court of appeals' decision, however, resolved a disputed question of *law*, not fact—whether state law can be preempted by agency recommendations or guidelines in the absence of any

federal law. There is no need for review of that purely legal question.

III. There Is No Genuine Circuit Split on the Tolling Issue, and, in Any Event, This Case Is an Inappropriate Vehicle for Resolving It.

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974), the Court held that commencement of a "class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." Later, in *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54 (1983), the Court made clear that *American Pipe* tolling applies not only to class members who intervene in the original action but also to class members who file separate actions.

The court of appeals held that respondent Wise, a putative class member in this case, was entitled to tolling because the class certification motion was pending on July 10, 1997, the day the district court allowed Wise's individual joinder in the consolidated district court action. *See* R. 977. The parties agree that if the *American Pipe* rule applies, Wise's joinder was timely.

Petitioners claim, however, that putative class members whose statutes of limitations have been tolled "forfeit" that tolling if they file suit while a class certification motion is pending and that this Court should grant review to resolve a purported circuit split on that question. There is no genuine circuit split, as the only three controlling circuit precedents on point support Wise's position. Moreover, even if there were a circuit split, this case would be a poor vehicle for considering the

issue. Finally, the court of appeals resolved the issue correctly.

A. Petitioners' claim of a circuit split relies mainly on *Wyser-Pratte Management Co., Inc. v. Telxon Corporation*, 413 F.3d 553, 568 (6th Cir. 2005). There, with scant analysis, the Sixth Circuit expressed agreement with petitioners' position that a class member who files an individual action before class certification is resolved forfeits the benefits of tolling. But the Sixth Circuit's statement was dicta—that is, "unnecessary to the decision in the case and therefore not precedential," *Black's Law Dictionary* 1100 (7th ed. 1999)—because the court had already held, after extensive analysis, 413 F.3d at 561-66, that "the applicable two-year statute of limitations [had] expired before this class action was filed." *Id.* at 568. "Dictum settles nothing, even in the court that utters it." *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005). Not surprisingly, the Sixth Circuit does not consider itself bound by such dicta. *See United States v. Williams*, 354 F.3d 497, 510 (6th Cir. 2003) (declining to follow as dicta the court's legal conclusion in *United States v. Clutter*, 914 F.2d 775, 779 (6th Cir. 1990), because it was unnecessary to that decision); *United States v. Magouirk*, 468 F.3d 943, 949 (6th Cir. 2006). Thus, there is no controlling precedent on the tolling question in the Sixth Circuit, which is free to consider the question anew in light of the decision below, the Second Circuit's in-depth analysis in *In re Worldcom Securities Litigation*, 496 F.3d 245 (2007), and the Tenth Circuit's recent decision in *State Farm Mutual Automobile Insurance Co. v. Boellstorff*, 540 F.3d 1223 (2008), all of which post-date *Wyser-Pratte* and flatly reject petitioners' position.

Petitioners' citation to *Glater v. Eli Lilly & Co.*, 712 F.2d 735 (1st Cir. 1983), is even weaker. There, the plaintiff, a Massachusetts resident, filed an individual action claiming residence in New Hampshire for jurisdictional purposes because she was a resident of that state at the time of the filing of an earlier class action, of which she was a putative member and in which a motion for class certification was still pending. *Glater* did not even present a tolling question, let alone the one presented here. And although *Glater* rejected the plaintiff's jurisdictional argument on the ground that "*American Pipe* says nothing about her ability to maintain a separate action while class certification is still pending," *id.* at 739, it did not even cite this Court's then-one-month-old decision in *Crown*, which expressly extended the reach of *American Pipe* beyond intervenors to "'*all* asserted members of the class.'" *Crown*, 462 U.S. at 353 (quoting *American Pipe*, 414 U.S. at 554) (emphasis added).[5]

In sum, after nearly 35 years since *American Pipe*, only three courts of appeals have weighed in on the question presented in controlling decisions, and there is no conflict among them. Review is therefore unwarranted.

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[5] Even further afield is petitioners' "*cf.*" citation to a footnote in *Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1981). There, the court held that the plaintiff's claims were *not* time-barred *without* tolling, *id.* at 350, rendering the court's brief tolling discussion dicta. Moreover, the court's opaque statement indicating that the plaintiff was not entitled to tolling appears to have been premised on the notion that *American Pipe* extended only to intervenors, *id.*, a limitation rejected by this Court two years later in *Crown*.

B. In any event, *this case* is a particularly poor vehicle for resolving the question presented. The foregoing discussion assumed, for argument's sake, that the tolling question involves an all-or-nothing choice: that *American Pipe* either does or does not apply in all instances where a class member seeks individual relief while class certification is pending. That is not necessarily so.

Petitioners' view that tolling is forfeited by a class member who bring claims while certification is pending is premised on the notion that a contrary rule would multiply litigation and undermine the class action's efficiency. *See* Pet. 30-31. To be sure, in the prototypical class action—such as a securities or small-claims consumer fraud case, *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)—class members who do not wish to be bound by the class judgment are free to file entirely separate actions in state or federal courts around the country, where they may conduct their own discovery and motions practice and try their own cases. That course of action arguably involves some undesirable inefficiency. In our view, such potential inefficiency is no reason to jettison *American Pipe* even in the prototypical case. *See infra* pp. 31-33. But it surely does not suffice to deny tolling under the circumstances presented here.

As explained above (at 7), a PAA "public liability action" arises exclusively under federal law, 42 U.S.C. § 2014(hh), and is heard by the federal district court where the alleged nuclear incident occurred. *Id.* § 2210(n)(2). After one action is filed, all other actions concerning the same incident will be litigated together in that *one* court, which serves as the exclusive forum for coordinated discovery, motion practice, and trial—whether the suits take the form of class actions, groups of related individual

actions, or a combination of the two. Thus, any inefficiency concern over application of the *American Pipe* rule in the ordinary class action—where truly separate actions may be filed all over the country—are simply not present in the *sui generis* circumstances presented by the PAA.

The facts here underscore our point. The motion for class certification was filed in April 1994, Pet. App. 38a, and, while it was pending, putative class members, including respondent Wise, sought individual relief *not* by filing separate suits—indeed, not by filing *any* pleading at all—but simply by stipulating with the defendants to a court order allowing them to join the consolidated action pending in the district court, as a "plaintiff[] asserting individual personal injury claims against defendants." R. 977, at 3. At the same time, the court ordered the newly joined plaintiffs, including Wise, to submit discovery materials within tight time frames to move the action forward. *Id.* at 3-4. Indeed, in a consolidated PAA action such as this one, it is the no-tolling rule advocated by petitioners that would undermine efficiency by discouraging plaintiffs such as Wise from serving as bellwethers, to help move the case toward settlement, for fear that, in doing so, they might lose the protection afforded by *American Pipe.*

In sum, the unique circumstances of a PAA bellwether plaintiff provides a poor vehicle for addressing the general question presented in the petition.[6]

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[6] Another circumstance peculiar to this case renders it an inappropriate vehicle for review. Even if this Court were to grant review and reverse on the tolling question, the ruling could have an immediate effect only on respondent Wise. And Wise maintains that her individual joinder was timely even without tolling because

C. If a genuine circuit split eventually develops, and the tolling issue is presented via an appropriate vehicle, there will be time enough to address the merits. For now, a brief rejoinder suffices. As noted, petitioners' claim that tolling should not apply here is premised entirely on the assertion that facilitating the filing of individual suits before class certification has been resolved would undermine a policy favoring efficiency that *American Pipe* seeks to achieve. For starters, that policy argument runs headlong into *Crown*'s plain holding that tolling applies to "*all* asserted members of the class." 462 U.S. at 353 (quoting *American Pipe*, 414 U.S. at 555) (emphasis added). Second, petitioners' argument overlooks that *notice*, and not efficiency, is the touchstone of the *American Pipe* rule. Once a class action has been filed, the defendant has been apprised of the scope and magnitude of the action, *American Pipe*, 414 U.S. at 555, and, thus, as to all class members, has been provided all the notice that statutes of limitations are intended to afford. *Id.* at 554-55; *Crown*, 462 U.S. at 352-53.

Petitioner asserts that the notice rationale "proves too much" because, under it, "statutes of limitations should be tolled for any plaintiff who brings the same claim against a defendant that has already been brought by someone

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the applicable three-year statute of limitations, Wash. Rev. Code 4.16.080(2), did not accrue until she had reason to know that her cancer was related to exposure from Hanford. *See supra* p. 9; Pls. 9th Cir. Br. 41 n.6. (This issue was not resolved below because petitioners did not contest application of *American Pipe* tolling before the district court.) Thus, resolution of the tolling issue may do almost nothing to resolve this 18-year-old litigation and might not even affect Wise, the one respondent whose tolling claim was resolved below.

else, *regardless of whether the first lawsuit was a class action.*" Pet. 32 (emphasis added). That assertion is manifestly incorrect. A *class* action (unlike an individual action) puts the defendant on notice of the aggregate class claim—that is, "the number . . . of the potential plaintiffs" and "the size of the prospective litigation." *American Pipe*, 414 U.S. at 555. Indeed, it is *petitioners'* position that proves too much. If, as petitioners imply, the filing of a class action provides no more notice of a defendant's potential aggregate liability than does the filing of an individual action, then it is the *American Pipe* rule itself, and not the particular application of it presented by petitioners, that would be the cause for concern. *American Pipe*, though, is a longstanding attribute of federal class action jurisprudence, and, in any case, its validity is not before the Court.

As petitioners observe, this Court noted that a "contrary [no-tolling] rule," *American Pipe*, 414 U.S. at 553, could undermine efficiency by *forcing* class members to file individual cases that they might not otherwise file. *See also Crown*, 462 U.S. at 353. But this Court's precedents do not remotely suggest that class members whose statutes of limitations are already tolled should, in the name of efficiency, *forfeit* tolling when they file suit while certification is pending. After all, following a ruling on certification, any class member may sue and take advantage of *American Pipe*. Indeed, even when certification is *granted*, and a court has therefore determined that the class device is "superior" to other methods "for fairly and efficiently adjudicating the controversy," *see* Fed. R. Civ. P. 23(b)(3), class members, armed with the protection afforded by *American Pipe*, may exclude themselves from the class and file their own

suits, *see* Fed. R. Civ. P. 23(c)(2)(B)(v); *Crown*, 462 U.S. at 351-52, despite any inefficiency that may entail. It is therefore difficult to see why one of those same class members, who has decided before the court's certification ruling that she does not want to be part of the class—perhaps because she has become able to retain her own attorney or because she disagrees with class counsel's litigation strategy—should forfeit the tolling otherwise available to her immediately after the certification issue is resolved. *See State Farm*, 540 F.3d at 1233 ("[T]he group that would file individual suits during the window at issue here is likely to approximate in number the group that would later opt-out if a class is certified or file individual suits if not. The courts' case-load will likely remain the same; the only difference is *when* those cases show up on the dockets.").

For these reasons, the court of appeals' tolling ruling is correct.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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November 2008